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No. 89-1441

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

INNOTRON DIAGNOSTICS,
Petitioner,
v.
ABBOTT LABORATORIES,
Respondent.

OPPOSITION TO PETITION OF INNOTRON DIAGNOSTICS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent Abbott Laboratories ("Abbott") respectively submits this brief in opposition to the petition of Innotron Diagnostics ("Innotron") for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.[1]

[1]Pursuant to Rule 28.1, Abbott certifies that Abbott does not have parent companies, subsidiaries that are not wholly owned, or affiliates.

I.

INTRODUCTION

In a memorandum opinion filed on December 15, 1989, the Ninth Circuit affirmed the district court's partial summary judgment dismissing Innotron's Sherman Act antitrust claims against Abbott. The Ninth Circuit correctly held that Innotron had failed to produce enough evidence to create a genuine issue of material fact on its Section 1 tying claim and its Section 2 monopolization claim. The decision was, in all respects, a routine application of Rule 56 of the *Federal Rules of Civil Procedure* to antitrust cases. Innotron's arguments that this case presents three questions appropriate for review by this Court are based on mischaracterizations of the opinion of the Ninth Circuit and on misperceptions of the law of summary judgment. No conflict among the circuits exists with respect to the issues identified by Innotron, nor are there any other special and important reasons to grant this writ of certiorari.

First, contrary to Innotron's contentions, the Ninth Circuit did not hold that "no claim of monopolization can be predicated on 'tying' conduct which escapes *per se* condemnation." Petition at 12. Rather, the Court affirmed summary judgment on Innotron's Section 2 claims because Innotron did not even attempt to provide significant probative evidence that Abbott's conduct was predatory or anticompetitive in any respect beyond the allegations of a tying arrangement.

Second, while Innotron contends that the lower courts erred in refusing to consider whether the tying arrangement at issue could violate Section 1 of the Sherman Act under a rule of reason analysis, Innotron did not even raise a rule of reason claim in the district court. Under

the law of summary judgment, as announced by this Court and consistently applied in all of the circuits, once a moving party has filed its properly supported motion, it is the responsibility of the responding party to come forward with substantial probative evidence showing that it has a claim. Innotron failed to make such a showing, whether under a Section 1 *per se* theory or the rule of reason.

Third, Innotron claims that the Ninth Circuit improperly chose between what that Court "admitted" were reasonable competing inferences as to the evidence. Innotron asserts that review by this Court is warranted because this "weighing of competing inferences as an appropriate standard for summary judgment" constitutes authorization for "abolition of the jury system." Petition at 17. But the express language of the Ninth Circuit's opinion tells a very different tale. Far from finding that the inferences urged by Innotron were reasonable, the Court of Appeals held that "for a jury to find in Innotron's favor, it would have to draw *inferences* . . . which are *unreasonable* given the lack of supporting evidence." Petition at A4 (emphasis added).)[2] As this Court has stated, in order to defeat summary judgment "there must be evidence on which the jury could *reasonably* find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2512 (1986) (emphasis added). The Ninth Circuit's decision in this case is a correct and unexceptional application of that principle.

In sum, Innotron has failed to present any issues appropriate for review by this Court. Accordingly, the petition for writ of certiorari should be denied.

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[2]The Ninth Circuit's memorandum is attached to Innotron's petition as Appendix A.

II.

STATEMENT OF THE CASE

A. Statement of Facts.[3]

Among Abbott's many health care products are therapeutic drug monitoring tests ("tdm reagents") that measure the level of prescription drugs in a blood sample. In the fall of 1981, Abbott launched a new diagnostic instrument called the TDx. In conjunction with tdm reagents specific to the particular drugs being measured, the TDx monitors the amount of drug in a patient's blood. Petition at B2.

By 1984 Innotron had developed and had begun to market reagents to be used specifically and only with the Abbott TDx. In August 1986, however, Innotron filed for bankruptcy and sold its reagent product line to a competitor, retaining this lawsuit as its principal asset. *Id.*

1. Abbott's TDx Marketing Practices

a. TDx Placement Options

At all times relevant to this case, Abbott has offered to its customers three principal means by which to obtain a TDx analyzer: outright sale, third party lease or reagent agreement plan ("RAP"). Under the sale option, a hospital or laboratory pays a lump sum to Abbott and acquires possession of and title to the TDx analyzer. Under the leasing option, the customer wishing to acquire a TDx negotiates a lease with a third party leasing company.

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[3] Unless otherwise noted, the facts set forth are among those established by Abbott in support of its motion for summary judgment that were either admitted or uncontroverted. Citations are to the District Court's Order on Motion for Summary Judgement, included in the Petition as Appendix B.

Abbott receives a lump sum for the analyzer from the leasing company, which acquires title to the equipment. Petition at B3.

Customers who acquire the TDx under either the sale or lease options have no contractual obligation to purchase any reagents for use on the instrument from Abbott, but are free to use any reagents, from any available source, without seeking approval from Abbott. *Id.*

Under a RAP, by contrast, Abbott retains title to the TDx analyzer, although the customer is free to buy the instrument at any time. In essence, the customer is permitted to use the TDx without a separate charge as long as it agrees to buy a specified minimum quantity of reagents and to use only Abbott reagents with the TDx. *Id.*

All Abbott customers are provided the choice of acquiring a TDx by purchase, lease, or under a RAP contract. Abbott has attempted to promote TDx purchase and lease through special programs. Nevertheless, the RAP placement has proven to be the most popular option offered by Abbott, and the percentage of TDx customers choosing purchase or lease has declined. Innotron concedes that various marketplace factors have contributed to the decline in the percentage of TDx users who own or lease their instruments. *Id.*

Abbott does not control the use by TDx owners or lessees of non-Abbott reagents. However, a customer who obtains the use of a TDx on a RAP obligates itself to use only Abbott reagents with the TDx. *Id.*

b. TDx Service Plans

TDx purchasers receive a three month warranty on the instrument from Abbott. After the warranty expires, a

TDx owner may choose between at least the following three basic service options: (1) a "time and materials" plan, with payment based on actual labor and parts needed; (2) an annual service contract; and (3) a self service plan, consisting of spare parts for the TDx instrument, a cabinet, automatic resupply of the parts as they are used, and instructions. Petition at B4.

The TDx owner may obtain any of the above service plans free of any obligation to use only Abbott reagents. The self service plan is available to TDx owners and RAP customers on a purchase basis, without such contractual restriction. It is also available free of surcharge to high volume TDx users who commit to purchase most of their test volume from Abbott. *Id.*

B. The Proceedings Below.

Innotron filed its antitrust complaint against Abbott on April 1, 1985. Innotron contended, *inter alia*, that Abbott had "tied" the availability of the TDx instrument to the purchase of Abbott reagents in violation of Section 1 of the Sherman Act. Innotron also claimed that Abbott had committed an independent violation of Section 1 by revising the software used in the TDx instrument to "lock out" competitive reagents.[4] Innotron further asserted that this alleged tying arrangement formed a basis for its Section 2 monopolization and attempted monopolization claims against Abbott.

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[4] Innotron subsequently abandoned its software modification claims in the face of Abbott's summary judgment motion showing that the changes improved both the performance and the reliability of the TDx instrument. These claims were formally dismissed pursuant to the district court's partial judgment under Rule 54(b), and issues related to this purported "technological tie" were not before the Ninth Circuit.

Abbott then brought a separate patent infringement action against Innotron to enforce a patent related to the technology of the TDx. Innotron subsequently amended its Section 2 claims to allege that Abbott had fraudulently procured its patent and had filed its infringement suit in bad faith.

After the close of three years of discovery, Abbott moved for summary judgment on all of Innotron's antitrust claims. In its motion papers, Abbott contended that no illegal tie-in existed between the TDx and Abbott tdm reagents because customers were at all times free to purchase the TDx from Abbott, without any restriction on the use of competitive reagents. Because Innotron had made no allegations of anticompetitive conduct other than its claims that Abbott's contractual restrictions and software modifications constituted tying arrangements in violation of Section 1, Abbott contended that a determination adverse to Innotron on these claims would be fatal to its non-patent-related claims under Section 2 as well. Finally, Abbott argued that summary judgment was appropriate with respect to Innotron's patent-related Section 2 claims.

The district court granted Abbott's motion with respect to Innotron's tying-related claims under Sections 1 and 2 of the Sherman Act. The court held that where the products in question are genuinely available on a separate basis, a tying arrangement has not been demonstrated, unless purchase of the package is coerced by pricing differentials or by other means. Petition at B6. It was undisputed that Abbott offered the TDx without the condition that Abbott reagents be purchased with it, and the district court found that Innotron had failed to meet its burden of introducing significant probative evidence that a tying arrangement was coerced by either price

differentials or other marketing tactics. Petition at B7 and B11. Finally, the court rejected as unsupported by the evidence Innotron's argument that Abbott had used service plans to tie TDx owners to the use of Abbott reagents. Petition at B11. With respect to Innotron's Section 2 claim, the court found that because Innotron's non-patent-related Section 2 claims rested upon the same allegations of coercive conduct found to be without support under Section 1, summary judgment was proper. Petition at B13.

On appeal, the Ninth Circuit affirmed the district court's judgment on all grounds.

III.

ARGUMENT

A. The Ninth Circuit's Decision In This Case Does Not Create a Conflict in The Circuits as to Whether a Monopolization Claim Can Exist Based on Conduct Which is Not *Per Se* Tying.

In urging that this Court review the decisions of the courts below on Innotron's Section 2 claims, Innotron does *not* argue that Innotron presented enough evidence in opposition to the motion for summary judgment to create a genuine issue of material fact with regard to those claims. Rather, Innotron attempts to identify a question for review by this Court by claiming erroneously that the "essence" of the Ninth Circuit's opinion in this case is that "no claim of monopolization can be predicated on 'tying' conduct which escapes *per se* condemnation under Section 1 of the Sherman Act." Petition at 12. Innotron further contends that this supposed holding creates an "important issue of substantive antitrust law"

as to which there is disagreement among the circuits. *Id.* at 13.

Despite Innotron's contentions, neither the Ninth Circuit nor the district court in this case stated or implied that summary judgment was appropriate "merely because the [alleged] 'tying' conduct may not be a per se Section 1 violation." To the contrary, the courts below simply applied the well-established principle that in order for a plaintiff to prove a violation of Section 2, it must, among other elements, establish that the defendant has engaged in anticompetitive conduct designed either to obtain or preserve monopoly power in a relevant market. *See,* e.g., *United States v. Grinnel Corp.,* 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966); *Forro Precision, Inc. v. IBM Corp.* 673 F.2d 1045, 1058 (9th Cir. 1982); *Berkey Photo, Inc. v. Eastman Kodak Co.,* 603 F.2d 263, 273-275 (2d Cir. 1979).

In assessing Innotron's Section 2 claim, the lower courts first determined that Innotron relied solely on its tying allegations to satisfy the predatory or anticompetitive conduct element of a Section 2 violation. As the Ninth Circuit held,

> "the conduct that Innotron relies on to satisfy the unreasonable restriction of competition element of a monopolization claim or the anticompetitive element of an attempted monopolization claim is *precisely the same conduct* that Innotron relied on in its tying claim . . . *Nowhere in its opening or reply brief does Innotron highlight conduct separate and distinct from its tying claim to support its Section 2 claim.*"

Mem. Op. at 4-5 (emphasis added).

Since Innotron's allegations related to the conduct element of its Section 2 claim were identical to its tying

allegations, the question before the lower courts was whether the tying conduct alleged was anticompetitive or predatory. Innotron did not offer any evidence that this was the case which was different from or additional to its claims under the Section 1 tying theory. Accordingly, the court properly held that Innotron had failed to provide any evidence of anticompetitive conduct to support its Section 2 claim, and that summary judgment was appropriate.

This holding is wholly consistent with the holdings in the three other Ninth Circuit decisions cited by Innotron. For example, in *Foremost Pro Color v. Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984) ("Foremost"), the Ninth Circuit rejected plaintiff's contention that defendant's introduction of technologically related products incompatible with the products offered by competitors constituted a tying arrangement in violation of Section 1. In a passage cited by the Ninth Circuit in the instant case, the Court in *Foremost* then held that

> "*[b]ecause the conduct Foremost alleges in support of its Section 1 tying claim is not anticompetitive*, it is of no assistance to Foremost's efforts to state a claim for relief for monopolization or attempted monopolization, both of which require at least some allegation of anticompetitive conduct."

Id. at 543 (emphasis added).

Similarly, in *Mozart Co. v. Mercedes-Benz of North American, Inc.*, 833 F.2d 1342 (9th Cir. 1987), the only conduct that plaintiff alleged satisfied the anticompetitive or predatory conduct element of the Section 2 claim was the same conduct plaintiff had relied on to support its Section 1 tying claims. The court found that the alleged tying arrangement "cannot be characterized as the type of

predatory anticompetitive, or unfair conduct that is necessary to support a Sherman Act Section 2 claim." *Id.* In *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184 (9th Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985), the Ninth Circuit relied on the reasoning of the *Foremost* opinion to hold that where a plaintiff had failed to prove in the context of its Section 1 claims that an alleged tying arrangement constituted anticompetitive conduct, it could not rely on that arrangement alone to satisfy the predatory or anticompetitive conduct element of a claim under Section 2. *Id.* at 1184.

The Ninth Circuit's holding is also consistent with the law in other circuits. In each of the cases cited by Innotron, unlike the situation presented here, the plaintiff relied on allegations and evidence different from and in addition to its tying allegations to support a Section 2 claim. Indeed, the district court in the instant case properly distinguished *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1987), on precisely the ground that the plaintiff's allegations in support of its Section 2 claim were not identical to its tying allegations:

> "The bundled pricing program at issue in *SmithKline* did not leverage economic power to bind customers to particular products and so did not present a coercion problem under Section 1. Monopoly power was leveraged, however, to provide cumulative discounts which precluded effective competition in another market. This presented an independent antitrust problem cognizable under Section 2. In this case, Innotron's allegations under both sections are confined to the use of economic power to coerce tied purchases. Such coercion having been found lacking, defendant cannot be said to have engaged in conduct

> 'unreasonably restrictive' of competition for purposes of Section 2."

Petition at B13-14.

Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701 (7th Cir.), *cert. denied*, 439 U.S. 822 (1978), is similarly inapposite. In that case, as in *SmithKline*, the plaintiff alleged not only an illegal tying agreement but also that the defendant had leveraged its monopoly power in the market for one product to gain an unfair competitive advantage in the market for another product. *Id.* at 713. *See also Berkey Photo*, 603 F.2d at 276 (discussing *Sargent-Welch* as example of a monopoly leveraging case).[5]

In sum, the lower courts found that summary judgment on Innotron's Section 2 claim was proper because Innotron failed to present enough evidence of anticompetitive conduct to create a genuine issue of material fact, and *not* because of the application of some general rule unique to the Ninth Circuit. There is no conflict in the circuits created by the Ninth Circuit's summary dismissal of Innotron's Section 2 claim; nor is there any question appropriate for review by this Court.

B. The Court of Appeals and The District Court Properly Refused to Consider a "Rule of Reason" Analysis.

As Abbott explained below, Abbott's motion for summary judgment expressly sought dismissal of *all* of Inno-

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[5]On appeal to the Ninth Circuit, Innotron for the first time in this litigation asserted a so-called monopoly leveraging claim. The Ninth Circuit declined to address this issue, on the ground that it was not raised in the district court, Mem. Op. at 5, n. 2. Innotron does not challenge this aspect of the Ninth Circuit's decision.

tron's antitrust claims including all claims under Section 1 of the Sherman Act, on the ground that Innotron could not demonstrate the existence of genuine issues of material fact with respect to those claims. Abbott characterized Innotron's tying arrangement claims as allegations of *per se* violations of Section 1. In its papers opposing summary judgment, Innotron did not dispute this characterization. Moreover, Innotron conceded before the Ninth Circuit that it *nowhere* argued that it should be permitted to proceed to trial on a rule of reason claim if its *per se* claim was dismissed.

In its petition, Innotron does not argue that it raised the rule of reason issue below. Nor does Innotron dispute that courts of appeal will generally not consider issues raised for the first time on appeal, *see* e.g., *Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1477 (9th Cir. 1989), or that this general rule is fully applicable to an attempt to create a purportedly genuine issue of material fact on appeal from a summary judgment. *See Komatsu, Ltd. v. States Steamship Co.*, 674 F.2d 806, 812 (9th Cir. 1982).

Rather, Innotron claims that it should be excused from raising the rule of reason below simply because Abbott's moving papers did not expressly mention that particular theory of liability under Section 1. In essence, Innotron argues that the party moving for summary judgment somehow bears the burden of anticipating and negating all possible contentions and evidence that might be presented in opposition to the motion. This argument is utterly without merit.

Pursuant to Rule 56 of the *Federal Rules of Civil Procedure*, Abbott moved for summary judgment on Innotron's entire claim under Section 1 of the Sherman Act. It is well established that once a party meets its initial

burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, *see, Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986), the non-movant is required to set forth "specific facts showing that there is a genuine issue for trial." Rule 56(e). Here, Abbott met its initial burden as to Innotron's Section 1 claim. At that point, the burden properly shifted to Innotron to present admissible evidence showing that it had a Section 1 claim. If Innotron's Section 1 claim for relief included allegations related to a rule of reason claim, Innotron was obligated to present substantial probative evidence to support such a claim in opposition to the motion. Since Innotron failed to present such evidence, Innotron cannot now complain.

The authority cited by Innotron does not support Innotron's misreading of the law of summary judgment. Indeed, the lengthy quotation offered by Innotron from this Court's opinion in *Celotex* plainly stands only for the noncontroversial point that the party seeking summary judgment has the initial responsibility of informing the court of the basis of its motion.[6]

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[6]The Tenth Circuit opinion in *Monument Builders v. American Cemetery Association*, 891 F.2d 1473 (10th Cir. 1989), is irrelevant to the issues raised by Innotron. In that case, the issue was not the proper standard for summary judgment, but whether the allegations of a complaint were sufficient to state a claim under *Federal Rule of Civil Procedure* 12(b)(6).

C. The Ninth Circuit Properly Granted Summary Judgment On Innotron's Tying Claim On The Ground That There Were No Genuine Issues of Material Facts For Trial.

Innotron contends that the Ninth Circuit improperly chose between what the Ninth Circuit supposedly admitted were "reasonable" competing inferences. Innotron states that if this Court does not reach out to review the Ninth Circuit's opinion it will have done nothing less than "authorize abolition of the jury system." Petition at 17.

Innotron has created this argument out of whole cloth. Despite Innotron's claims, the Ninth Circuit never "admits," "concedes" or "acknowledges" that any possible inferences supporting Innotron's position are "reasonable." To the contrary, after first noting that "only inferences from two pieces of evidence . . . support Innotron's position at all," the Ninth Circuit flatly and unequivocally holds that those inferences are *"unreasonable."* The Court states, after examining the entire record, that

> "for a jury to find in Innotron's favor, *it would have to draw inferences from the price increases and the placement decline which are unreasonable* given the lack of supporting evidence."

Petition at A4 (emphasis added).

The plain language of the Ninth Circuit's opinion thus makes clear that there is no merit to Innotron's charge that the Ninth Circuit improperly weighed competing inferences. Instead, the Court of Appeals correctly followed the well-established principle that a court must grant a motion for summary judgment unless it determines that the non-moving party has provided "evidence on which the jury could *reasonably* find for the plaintiff." *Liberty Lobby*, 477 U.S. at 252. In discussing possible

inferences from the evidence, the Ninth Circuit merely performed the proper and necessary inquiry as to where there was any substantial evidence in the record to support Innotron's claims. After completing this inquiry, the Court concluded that there was no evidence on which jurors could find for Innotron. This decision neither "implicitly repudiates the jury system" nor presents an appropriate question for review by this Court. Rather it is a routine application of well settled law under Rule 56 of the *Federal Rules of Civil Procedure*.

IV.

CONCLUSION

For all the foregoing reasons, respondent Abbott Laboratories submits that this Court should deny Innotron's petition for a writ of certiorari.

DATED: April 16, 1990

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On April 16, 1990, I served the within opposition to Petition of Innotron Diagnostics for a Writ of Certiorari in re: "Innotron Diagnostics vs. Abbott Laboratories" in the United States Supreme Court, October Term 1989 No. 89-1441, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 16, 1990, at Los Angeles, California.

Ce Ce Medina

CE CE MEDINA